

Before the
Federal Railroad Administration
United States Department of Transportation

ADVISORY OPINION
10/1/04
10/1/04 11:06

Docket No. FRA-2004-18746-17
Union Pacific Railroad Company
Request for Air Brake and Inspection Waivers

**COMMENTS OF BROTHERHOOD RAILWAY CARMEN DIVISION,
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION
AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS**

The Brotherhood Railway Carmen Division of the Transportation Communications International Union, referred to herein as BRC, and International Brotherhood of Electrical Workers, referred to herein as IBEW, submits these written comments in the above-captioned waiver proceeding consistent with the FRA's scheduling order of August 31, 2004. BRC's General President Richard A. Johnson testified at the hearing held on October 1, 2004, and that testimony is part of the record in this matter and is incorporated by reference herein. These comments supplement that testimony.

Hazmat Issues

During his testimony, Mr. Johnson pointed out that UP had not explained how it intends to comply with hazmat regulation 49 U.S.C. § 174.9 which states:

§ 174.9 Inspection and **acceptance**.

At each location where a hazardous material is **accepted** for transportation or placed in a train, the carrier shall inspect each rail car containing the hazardous material, at ground level, for required markings, labels, placards, securement of closures and leakage. This inspection may be performed in conjunction with inspections required under parts 215 and 232 of this title.

(Emphasis supplied.)

UP's General Superintendent Gary Davidson testified that a hazmat inspection was not required at Laredo since, in the UP's view, no such inspection was required at an interchange point. Because such an inspection was not required, UP did not file a waiver request from regulation 174.9.

UP's argument is contrary to Part 209, Appendix B which proscribes the penalty of \$4,000 per car for a violation of regulation 174.9 as follows:

174.9(a) Failure to properly inspect loaded, placard tank car at origin or **interchange**.

(Emphasis supplied.)

This provision makes clear that a carrier "accepts" hazardous freight when it interchanges with another carrier, and that a hazmat inspection is required when UP receives or "accepts" freight cars containing hazardous material from another carrier.

UP's carmen at Laredo, Texas, are currently performing the hazmat inspection required by 174.9. UP would have the FRA believe that such inspections are voluntary and could be terminated at its discretion. The plain meaning of 174.9 as well as 209 indicate otherwise. UP's compliance with regulation 174.9 is not simply an academic issue since UP has acknowledged that intermodal trains subject to the waiver request do carry hazardous material. Indeed, the 1995 UP SAC-P report specifically found that trains containing hazardous material originating in Mexico sometimes had improper documentation and lacked placards in English (see attached).

TFM's Vice President Hernandez testified that its inspection more than meets the requirements of 174.9, and UP Superintendent Davidson maintained that the inspection done at the border by Homeland Security met such requirements. No evidence was

submitted by TFM pertaining to its inspections of hazardous materials, and the gamma ray test at the border simply shows that the material which is supposed to be contained in a particular freight car, in fact, is in that car. The gamma ray also assures that no people are within the car attempting to illegally cross the border. The gamma ray test does not reveal whether the car is properly placarded or whether hazardous material is leaking from the car as required by 174.9.

The assurances of carrier witnesses should be subject to examination in a waiver proceeding directed at Section 174.9. They should not be accepted at face value. Until UP can demonstrate that it is entitled to such a hazmat waiver, its request for a waiver of other regulations in this proceeding should be denied.

Failure to Adequately Translate FRA Regulations

Attached to UP's waiver request is some of the training material provided by TFM to its inspectors. This material includes Spanish translations of FRA regulations and instructions. BRC assumed that this translation was accurate. However, the testimony of BLE witness Terry Briggs revealed that the translation contained significant omissions and errors.

These serious translation errors in the documents filed in this proceeding belie UP and TFM's assurance that language differences are easily overcome. If the carriers are unable to get their filings properly translated, the FRA should be more than a little skeptical about such assurances.

Training

The waiver application and the testimony of TFM Vice President Hernandez heavily relied upon the training provided by the National Academy of Railroad Sciences (NARS) as evidence that TFM employees are properly trained. Vice President Hernandez testified that 100% of TFM field supervisors receive NARS training, though no evidence was submitted as to the percentage of employees receiving such training.

While a number of Class I carriers provided NASR training to their inspectors, as BRC General President Johnson testified this training is introductory and supplemental to the training received during a 732 day apprentice period. TFM has not introduced evidence of the training it provides its inspectors beyond the NASR introductory courses. It clearly has not established that its inspectors receive training equivalent to the apprenticeship program with periodic testing required of carmen in the United States before they reach journeyman status.

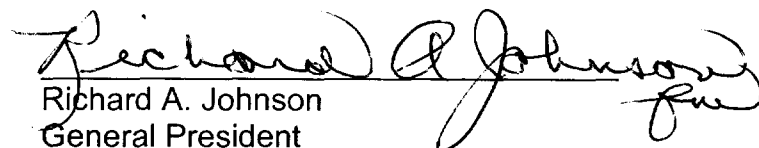
The NARS curriculum submitted with the waiver demonstrates that this training is not a substitute for apprenticeship programs, and no American railroad treats it as such. The curriculum indicates that a total of five days are devoted to training to “**introduce** the student to the proper methods of performing the Single Car Test procedures.” To gauge the relative importance given to brake testing, the NASR offers a five day course in AAR billing to “introduce students to the proper methods of billing for the repair of freight cars in accordance with AAR practices.” There is simply no evidence in this record to support UP’s claim that TFM inspectors are properly trained.

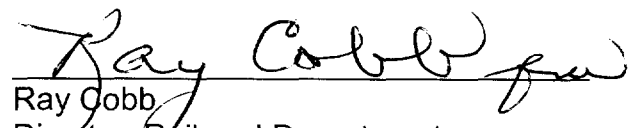
The Inspections Performed By TFM

UP has stated that its inspectors have uncovered relatively few defects on cars inspected by TFM. To the contrary, BRC submitted an exhibit showing that a significant number of defects have been found. In the face of BRC's evidence, UP's statements should not simply be accepted by the FRA. There is insufficient evidence to support the claim that TFM inspectors are properly performing the required Class I brake inspections.

Conclusion

Based on the foregoing and the evidence adduced at the hearing of October 1, 2004, BRC and IBEW respectfully submit that UP's waiver request in this matter should be denied.


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October 7, 2004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was mailed this 7th day of October, 2004, via first-class mail, postage prepaid, to Dennis Duffy, Executive Vice President Operations, Union Pacific Railroad Company, 1400 Douglas Street, Omaha, NE 68179.

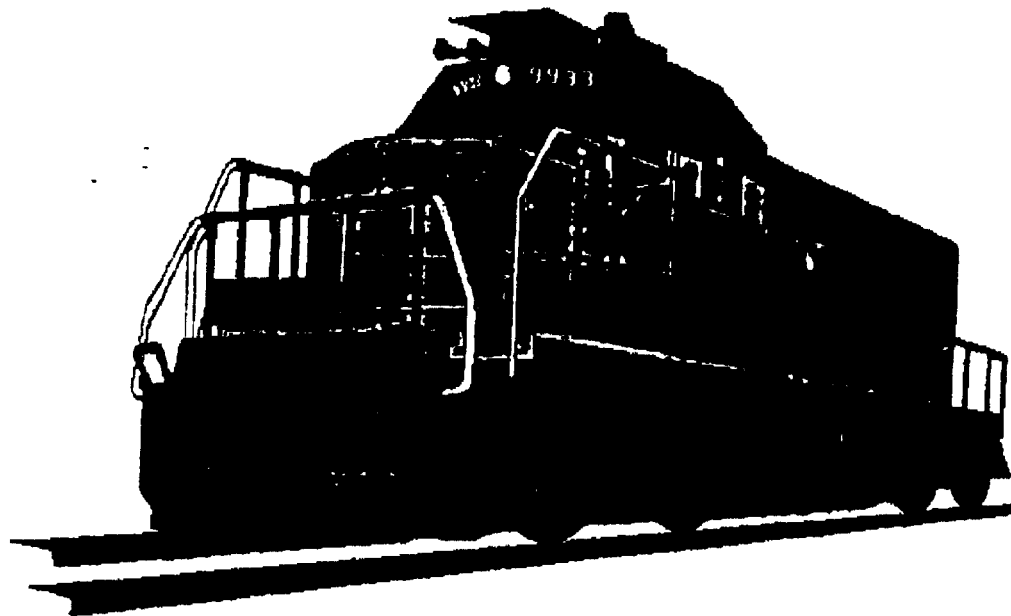
A handwritten signature in black ink, reading "Frances D. McNair". The signature is written in a cursive style with a large, sweeping initial "F" and a long, horizontal flourish extending to the right.



U. S. Department of Transportation
Federal Railroad Administration

Union Pacific Railroad Company Senior Management Meeting

August 23, 1995



**UP Senior Management Meeting
Hazardous Materials**

**Safety Issue No. UP95-HM3
TOFC/COFC**

Gate personnel at UP's various Hub Centers (St Louis, Houston, Seattle, and Kansas City) are not cross-checking the computer system HM billing against shipping papers offered at the gates involving TOFC/COFC HM shipments offered for transportation by rail.

Discussion:

A recent inspection of the Hub Centers operations listed above by FRA inspectors found gate personnel were not verifying the computer system billing for HM's. It was noted that gate personnel checking in trailers and/or containers checked the billing and if it was in the system none of the other screen information was checked for completeness and accuracy. Therefore HM shipments are being received and the shipment accepted without proper HM documentation.

Recommendation:

UP should ensure that gate personnel monitor the computer system to determine a HM shipment is billed properly before acceptance at the hub center facility.

**Safety Issue No. UP95-HM4
Shipments from Mexico**

United States import freight brokers are occasionally providing improper documentation for shipments of hazardous materials bound for the United States from Mexico. This sets up the possibility of hazardous materials cars being transported from the border to various destinations in the United States with improper/incomplete information provided by export Mexican brokers.

Discussion:

No rail car should be accepted from Mexico for transportation without proper hazardous materials documentation. If there is any question about a rail car containing hazardous materials, it should not be moved until the actual contents are determined.

UP Senior Management Meeting
Hazardous Materials

Tank cars inbound from Mexico often display Mexican placards. Tank cars that require the proper shipping name to be stenciled on the side of the car occasionally displayed the contents in Spanish.

Rail shipments containing hazardous materials from Mexico are being accepted for transportation at various border locations with improper placards and improper shipping papers. There are instances when hazardous materials shipment information on shipping papers is being altered by brokers using non-hazardous STCC codes to secure a more favorable transportation rate.

Recommendation:

Monitor all inbound shipments of hazardous materials at the Mexican border for proper documentation. If a rail tank car is not properly marked or placarded do not allow the subject car to continue in transportation until it is properly marked or placarded.

The carrier should monitor all freight brokers used to facilitate the movement of Mexican shipments of hazardous materials to ensure that proper documentation is provided.